

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 57870-s76M BY BRUCE D. ZEMLISKA)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written submissions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision of August 18, 1987, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

ORDER

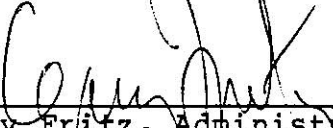
That Application for Beneficial Water Use Permit No. 57870-s76M by Bruce D. Zemliska be denied.

CASE # 57870


NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 25 day of September, 1987.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605



Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CASE # 57870

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Susan Howard, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on September 28, 1987, she deposited in the United States mail, first class postage prepaid, a FINAL ORDER by the Department on the Application for Beneficial Water Use Permit No. 57870-s76M, by Bruce D. Zemliska, addressed to each of the following persons or agencies:

Bruce D. Zemliska
Conifer Drive, Box 339
Huson, MT 59846

Edgar J and Christine E Scheffer
6 Mile Ranch
PO Box 49
Huson, MT 59846

Dennis W and Patricia L Scheffer
6 Mile Ranch
Box 98
Huson, MT 59846

Estate of Thomas Bladholm
c/o Ronald McDonald
Datsopoulos, McDonald and Lind
Central Square Building
201 West Main
Missoula, MT 59802

O Gordon and Juanita M Hirschi
218 Dixon
Six Mile Ranch
Missoula, MT 59801

Arthur Joseph Scheffer Jr
P O Box 1552
Belgrade, MT 59714

CASE # 57870

Mike McLane
Missoula Field Office Manager
P O Box 5004
Missoula, MT 59806
(inter-departmental mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Susan Howard

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 28th day of September, 1987, before me, a Notary Public in and for said state, personally appeared Susan Howard, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Gregory Van Voost
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires Oct. 17, 1989

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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 57870-s76M BY BRUCE D. ZEMLISKA)

* * * * *

Pursuant to the Montana Water Use Act, Montana Code Annotated (hereafter, "MCA") Title 85, Chapter 2 (1985), and the Montana Administrative Procedure Act, MCA Title 2, Chapter 4 (1985), a hearing in the above-entitled matter was held on April 13, 1987 in Missoula, Montana. The hearing was completed on April 13, 1987 and the record was closed.

Appearances

Applicant Bruce D. Zemliska appeared pro se.

Objector Dennis W. & Patricia L. Scheffer (hereafter, "Objector D. Scheffer") were represented by Dennis W. Scheffer.

Arthur Scheffer, appeared as a witness for Objector D. Scheffer.

Objector Arthur J. Scheffer, Jr. appeared pro se.

Objector Estate of Thomas Bladholm appeared by and through counsel, Rebecca Summerville of Datsopoulos, MacDonald and Lind, Attorneys at Law.

Michael P. McLane, Manager of the Missoula Field Office, Water Rights Bureau, Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC"), appeared as staff expert witness.

CASE # 57870

Preliminary Matters

At the beginning of the hearing, Objector Estate of Thomas Bladholm moved to withdraw its objection to the Application. The motion was granted and the objection withdrawn.

Exhibits

Applicant presented one exhibit for the record. Applicant's Exhibit 1 (three pages: photocopied letters) was admitted without objection.

Objector D. Scheffer presented four exhibits for the record. Objector D. Scheffer Exhibit 1 (a hand drawn map) was admitted with the stipulation that Applicant's house and pond are not located exactly as marked thereon. Objector D. Scheffer Exhibit 2 (a topographic map) was admitted with the stipulation that the "catch ditch" is not located exactly as marked thereon. Objector D. Scheffer Exhibits 3 (two pages: photocopied county records) and 4 (three pages: photocopied county records) were admitted without objection.

The Department presented two exhibits for the record. Department Exhibits 1 (two pages: photocopied letters) and 2 (four pages: one original and three photocopied letters) were admitted without objection.

No objections were registered to the contents of the Department file, which includes inter alia a Field Investigation Report prepared by Michael P. McLane.

PROPOSED FINDINGS OF FACT

1. MCA §85-2-302 (1985) provides that, except in the case of certain groundwater and livestock appropriations listed in §85-2-306 (1985), "a person may not appropriate water or commence construction of diversion, impoundment, withdrawal or distribution works therefor except by applying for and receiving a permit from the department." The requested appropriation does not fall under the exception described in MCA §85-2-306 (1985).

2. The Application in the matter was regularly filed with the DNRC on April 29, 1985 at 10:30 a.m.

3. The pertinent facts of the Application were published in the Missoulian, a newspaper of general circulation in the area of the source, on June 19 and 26, 1985.

4. By this Application, Applicant seeks a permit to appropriate, nominally from the West Fork of Six Mile Creek (hereafter, "West Fork") a tributary of the Clark Fork River, 200 gpm up to 322 acre-feet per year for year-round non-consumptive use in nine (9) flow-through fish ponds with a combined offstream storage capacity of 3.78 acre-feet, said use to occur in the $N\frac{1}{2}N\frac{1}{2}NW\frac{1}{4}SW\frac{1}{4}$ of Section 11, Township 15 North, Range 22 West Missoula County, Montana. The proposed point of diversion is located in the $SW\frac{1}{4}SW\frac{1}{4}NE\frac{1}{4}$ of Section 2, Township 15 North, Range 22 West, Missoula County, Montana. The proposed means of diversion is an existing headgate, ditch and natural carrier.

5. Objectors Scheffer divert water from the West Fork pursuant to Statements of Claim of Existing Water Right Nos.

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99192, 99193, 99194, 99195 and 99196. Statement of Claim of Existing Water Right No. 99192 claims 100 miner's inches (1,120 gpm) up to 575 acre-feet per year diverted from the West Fork at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2, Township 15 North, Range 22 West for irrigation of 115 acres between April 15 and December 31 each year; Statement of Claim No. 99194 claims 100 miner's inches (1,120 gpm) up to 413 acre-feet per year diverted from the West Fork at point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2, Township 15 North, Range 22 West for irrigation of 118 acres between April 15 and December 31 each year; Statement of Claim No. 99196 claims 100 miner's inches (1,120 gpm) up to 1.5 acre-feet per year diverted from the West Fork at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2, Township 15 North, Range 22 West, for year-round stockwater use. Statements of Claim Nos. 99193 and 99195 claim points of diversion on the West Fork in Section 14 and Section 11, respectively, both in Township 15 North, Range 22 West. (Department records.)

6. Although Statements of Claim Nos. 99192, 99194 and 99196 claim points of diversion (NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2, Township 15 North, Range 22 West) described as other than Applicant's proposed point of diversion (SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2, Township 15 North, Range 22 West), the headgate, ditch and natural carrier which Applicant proposes as his means of diversion are the same headgate, ditch and natural carrier (hereafter for convenience, collectively referred to as the "Scheffer ditch") which are

utilized pursuant to said Statements of Claim Nos. 99192, 99194 and 99196. (Testimony of Applicant, Objector D. Scheffer, Mike McLane.)

7. Pursuant to their claims, Objectors Scheffer divert water from the West Fork, which water is subsequently conveyed by ditch to a drainage (natural carrier). The water is then shunted from the ditch into the drainage, which carries the water to Applicant's property where it is picked up by another ditch and thence conveyed to Objectors Scheffers' property. (Testimony of D. Scheffer, Field Investigator).

8. Applicant intends to impound and non-consumptively utilize water, which has been diverted by Objectors Scheffer from the West Fork pursuant at least to Statements of Claim Nos. 99192, 99194 and 99196 and conveyed to his property by means of the Scheffer ditch, for fish raising prior to its ultimate application to beneficial irrigation use by Objectors Scheffer. However, when Objector Scheffer is not diverting water, Applicant would nevertheless require 200 gpm for maintenance of a fish population. In such case, Applicant intends to himself cause diversion of sufficient water from the West Fork through the Scheffer ditch to his ponds, to compensate for the shortfall. (Testimony of Applicant.)

9. Applicant presented no evidence regarding the availability of unappropriated water in the West Fork.

10. Applicant presented no evidence that water in excess of Objectors Scheffers' needs has ever been, is, or will be, diverted into the Scheffer ditch.

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter hereunder, and over the parties hereto. (Finding of Fact 1, 2.) MCA Title 85, Chapter 2, Part 3 (1985).

2. The Department gave proper notice of the hearing (Finding of Fact 3) and, all substantive and procedural requirements of law or rule having been fulfilled, the matter is properly before the Hearing Examiner.

3. MCA §85-2-311 (1985) provides that the Department shall issue a Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant,
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The Applicant in fact seeks to make two separate appropriations from separate sources of supply. Despite the fact that the Application lists the source for the entire appropriation as the West Fork, and though admittedly all of the water requested by Applicant does derive from the West Fork, it cannot be said as a matter of law that all of the water Applicant intends to utilize would be appropriated from that source.

In water law, to appropriate means to take possession of water for ultimate application to a beneficial use; to take possession of means to divert from a particular source. Of course, the ultimate source for any appropriation is precipitation, and there are normally multiple tributaries conveying water to the body of water from which diversion is ultimately made; however, it is the body of water from which the appropriator makes actual diversion that is regarded as the source de jure.

In the instant case, Applicant seeks to make diversion of water, i.e., to take actual possession of it, from the West Fork, only when Objectors are not diverting sufficient amounts to allow him 200 gpm. Otherwise, Applicant seeks to take actual possession of water (which Objectors have already diverted from the West Fork of Six Mile Creek) at a point not on the West Fork but at a point on the Scheffer ditch. Thus it is that Applicant seeks to appropriate water from two "sources": the Scheffer ditch, when Objectors Scheffer are diverting sufficient water to supply Applicants' needs, and from the West Fork when Scheffer are not.

5. As to the Scheffer ditch "source", Applicant has failed to show that there is unappropriated water available.

Upon its diversion by Objectors Scheffer, the water in the Scheffer ditch is perforce appropriated water, at least to the extent of the Objectors' Claims of Existing Right, which must be taken as prima facie evidence of their content. MCA §85-2-227. As Applicant presented no evidence that Objectors divert water in excess of their claimed amounts, it is further presumed that all water diverted from the West Fork and carried by the ditches are waters legally appropriated by the Objectors. Thus, Applicant has failed to prove that unappropriated water exists in the Scheffer ditch as required under MCA §85-2-311 (a)(i)(ii) and (iii).

6. Any use, whether consumptive or non-consumptive, made by Applicant of water actually diverted by Objectors herein would constitute an adverse effect to the water rights of the Objectors.

Although water while flowing in a natural stream is not subject to private ownership, where it is impounded or reduced to possession by artificial means, it becomes the private property of the possessor during the period of possession, whether such property is considered personalty; Hageman County v. McMurray, 113 P. 823 (N.M., 1911); People ex rel. Heyneman v. Blake; 19 Cal 579; see also Helena Water Works v. Settles, 37 Mont. 237, 95 P. 838 (1908), (holding that a water right is personalty for taxation purposes); or realty. Copeland v. Fairview Land and Water Co., 131 P. 119 (Cal., 1913). Although

MCA §85-2-301(1) declares that "the waters within the state are the property of the state for the use of its people," that such phrase does not apply to the corpus of water while it is in the possession of the appropriator is implied by the remainder of subsection (1) which declares that state waters "are subject to appropriation for beneficial use as provided in this chapter." Further, as private ownership of the corpus of water diverted has been historically regarded by the law as part and parcel of ownership of a water right, said statute would be unconstitutional to the extent it operates to deprive the water right holder of ownership of the corpus of water diverted pursuant thereto. See Article IX, §3, Constitution of Montana.

The owner of property has the right to possess and use it to the exclusion of others. MCA §70-1-101; 63A AmJur, Property §3. Thus, as ownership of a water right confers ownership of the corpus of water which has been diverted for beneficial use upon the holder of the water right, and as ownership of property necessarily confers the right to possess and use it to the exclusion of others, any use whatever made of such property without consent, by one not its owner, whether or not he causes actual damage to the rightful owner, constitutes trespass.

Martin v. Reynolds Metals Co., 221 Or. 86, 342 P.2d 790, cert. den. 362 US 918, 80 SCt. 672. Trespass is by definition adverse effect to (interference with) property rights. Therefore, any use whatever made by Applicant of water diverted by Objectors Scheffer would, as a matter of law, constitute adverse effect to Scheffer's water rights.

7. Regarding the appropriation sought from the West Fork, i.e., Applicant's actual diversion of water from the West Fork when water is not being diverted by Scheffer, Applicant has not presented a scintilla of evidence that there is ever unappropriated water available in the West Fork, all evidence brought forth by Applicant being in regard to the use of the Scheffer appropriation. Thus, Applicant failed to prove that there is unappropriated water in the West Fork as required under MCA §85-2-311(a)(i)(ii) and (iii).

WHEREFORE, based on the foregoing Proposed Findings of Fact and Proposed Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

That Application for Beneficial Water Use Permit No. 57870-s76M by Bruce D. Zemliska be denied.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20

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days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to

those issues which the parties have set forth in their written request for oral argument.

DONE this 18 day of August, 1987.



Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CASE # 57870

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Susan Howard, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on August 20, 1987, she deposited in the United States mail, first class postage prepaid, a PROPOSAL FOR DECISION by the Department on the Application for Beneficial Water Use Permit No. 57870-s76M, by Bruce D. Zemliska, addressed to each of the following persons or agencies:

Bruce D. Zemliska
Conifer Drive, Box 339
Huson, MT 59846

Edgar J and Christine E Scheffer
6 Mile Ranch
PO Box 49
Huson, MT 59846

Dennis W and Patricia L Scheffer
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Arthur Joseph Scheffer Jr
P O Box 1552
Belgrade, MT 59714

CASE # 57870

Laurence Siroky
Assistant Administrator
DNRC
1520 East Sixth Avenue
Helena, MT 59620-2301
(hand-delivered)

Robert Scott
Hearing Examiner
DNRC
1520 East Sixth Avenue
Helena, MT 59620-2301
(hand-delivered)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Susan Howard

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 20th day of August, 1987, before me, a Notary Public in and for said state, personally appeared Susan Howard, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Donald MacLure
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 12/3/87

CASE # 57870